BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHRISTOPHER D. FINNEY	)	
Claimant	)	
VS.	)	
	)	Docket No. 216,317
FINNS ELECTRIC COMPANY, INC.	)	
Respondent	)	
AND	)	
	)	
FEDERATED MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant and respondent and its insurance carrier appealed the November 15, 2006, Post Award Medical order entered by Administrative Law Judge Nelsonna Potts Barnes. The Workers Compensation Board heard oral argument on February 6, 2007.

APPEARANCES

Robert R. Lee of Wichita, Kansas, appeared for claimant. Vincent A. Burnett of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board is listed in the Post Award Medical order. The record also includes the parties' written Stipulation to Van Conversion Charges filed with the Division of Workers Compensation on September 15, 2006.

ISSUES

This is a post-award proceeding in this claim for an October 12, 1995, accident. The original Award was entered on November 26, 2001. Claimant appealed that Award to the

Board and by its March 28, 2003, Order, claimant was awarded permanent total disability benefits and ongoing medical benefits.

Claimant requested this post-award proceeding. In the November 15, 2006, Post Award Medical order, Judge Barnes ordered respondent and its insurance carrier to reimburse claimant the sum of $2,016 for the cost of the Ford Company Mobility Package on claimant's van and the sum of $220 for the cost of an eye examination. In addition, the Judge ordered respondent to provide new floor coverings in claimant's residence and pay claimant's attorney post-award attorney fees of $4,675. The Judge denied claimant's request for reimbursement of the $350 that Dr. Dennett charged for testifying in this post-award matter.

None of the parties are satisfied with the November 15, 2006, order. Claimant contends he should be reimbursed the $350 fee of his medical witness, Dr. Dennett.

Respondent and its insurance carrier contend claimant failed to prove the mobility package for claimant's van, the eye examination, and the new flooring were medically necessary or would relieve the effects of claimant's work injury. They also contend claimant's attorney failed to properly itemize the time he spent on this post-award matter and that some of the tasks claimant's attorney expended on this matter should have been performed by his support staff.

The issues before the Board on this appeal are:

1. Should respondent and its insurance carrier reimburse claimant for the cost of the mobility option package that was on the van that claimant purchased for further conversion?

2. Should respondent and its insurance carrier be responsible for $220 for the cost of an eye examination?

3. Should respondent and its insurance carrier be responsible for replacing the carpeting in claimant's house that has been worn by claimant's wheelchair, with hard surface flooring?

4. Is claimant entitled to be reimbursed $350 by respondent for the fee of Dr. Dennett?

5. What, if any, post-award fee is claimant's attorney entitled to receive?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Claimant sustained serious injuries on October 12, 1995, when he was thrown from a bucket on a lift of a truck and fell over 25 feet to the ground. Claimant suffered multiple injuries including rib fractures, comminuted fractures of the right scapula, right clavicle, fracture dislocation of the T9-10 vertebrae, resulting in paraplegia from the waist down with the associated loss of bowel, bladder and sexual function. Those severe injuries required numerous surgeries with the first being decompression and fusion from T6-12.

1. Should respondent and its insurance carrier reimburse claimant for the cost of the mobility option package that was on the van that claimant purchased for further conversion?

The parties have agreed that respondent and its insurance carrier would be responsible for the costs of converting a van to claimant's use and that claimant would be responsible for the cost of the van to be converted. Respondent and its insurance carrier have accepted responsibility for most of the cost of converting a van chassis that claimant purchased. But they contend they should not be held responsible for the optional mobility package that came with the van. That is the only issue regarding the van.

Due to the seriousness of claimant's injuries, the authorized treating physician, Dr. Bryan K. Dennett, periodically sends claimant to the Craig Hospital in Englewood, Colorado, which specializes in spinal cord injuries offering comprehensive interdisciplinary evaluation and treatment. In February 2005, the hospital provided claimant with a prescription for a van, which claimant eventually took to an automobile dealer to begin the process of ordering a van to be converted with, among other devices, a wheelchair lift and controls to allow claimant to drive the vehicle.

The mobility package that claimant ordered at the time of purchasing the van included power windows and door locks, air conditioning, an auxiliary heating and air conditioning connection, power side mirrors, privacy glass, tow package, and a limited slip differential, all of which cost $2,016. The auxiliary heating and air conditioning connection facilitates the conversion, making the connection to the heating and air conditioning unit much easier and more reliable. The tow package includes a high output alternator, which is desirable due to the additional electronics on a converted van, transmission cooler and bigger radiator, which are desirable due to the added weight of the van.

At the time of the June 2006 post-award hearing, claimant's new Ford van had been sitting at a conversion company in Indiana since it was purchased in August 2005.

The Board concludes the mobility package includes items that were specifically prescribed by the Craig Hospital. Moreover, the items in the mobility package are reasonably necessary as part of the van's conversion and should be included as part of the conversion expenses that respondent and its insurance carrier should pay. Consequently, the Judge's order that respondent and its insurance carrier should reimburse claimant the sum of $2,016 should be affirmed.

2. Should respondent and its insurance carrier be responsible for $220 for the cost of an eye examination?

As a result of the October 1995 accident, claimant developed Horner's syndrome. The syndrome is a dysfunction of the autonomic nervous system that interferes with the pupils dilating and contracting properly. Accordingly, claimant needs periodic evaluations by an ophthalmologist. Dr. Dennett recommends claimant see an ophthalmologist annually.

Claimant presented a bill from Grene Vision Group with an outstanding balance of $220. In August 2005 and January 2006, claimant went to the Vision Group as his vision was changing and he needed different prescription lenses.[1] The billing statement introduced by claimant at the March 2006 post-award hearing indicated claimant was charged $100 for an "OPH EXAM EST PT COMP (BURDEN OD, GAIL)" and $20 for "REFRACTION (BURDEN OD, GAIL)."[2] The remainder of the $220, or $100, is shown as a balance being carried forward.

In conjunction with the Grene Vision Group billing, claimant introduced August 19, 2005, and December 5, 2005, letters from Dr. Mark L. Wellemeyer of the Grene Vision Group to attorney Orville Mason. Those letters addressed an *August 11, 2005,* examination he had performed on claimant and claimant's Horner's syndrome.

There is nothing in the Grene Vision Group billings that corresponds to an August 11, 2005, examination or an examination by Dr. Wellemeyer. Although it is uncontradicted claimant requires yearly eye examinations due to the Horner's syndrome, which is directly related to claimant's October 1995 accident, claimant has failed to establish that the $220 owed Grene Vision Group is related to such annual eye examination. Consequently, the respondent and its insurance carrier should not be responsible for that outstanding balance.

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[1] P.A.H. Trans. (Mar. 9, 2006) at 29, 30.

[2] *Id.*, Cl. Ex. 1 at 20.

3. Should respondent and its insurance carrier be responsible for replacing the carpeting in claimant's house that has been worn by claimant's wheelchair, with hard surface flooring?

After claimant was injured, respondent and its insurance carrier paid to modify claimant's house to accommodate claimant's wheelchair. Part of the modification included low-pile carpeting. That carpeting is now approximately 10 years old. Unfortunately, claimant's wheelchair has worn that carpeting to such extent that it cannot be further repaired and must be replaced as the worn carpeting now impedes claimant from moving about his house. Consequently, claimant requests the respondent and its insurance carrier to provide him new floor coverings in "[t]he living room, the bedroom and the areas going to the bathroom and the hallway."[3] According to claimant, the doctors at Craig Hospital recommend a hard floor covering:

> Q. (Mr. Lee) Do you have trouble with mobility because of that [the worn carpeting]?
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> A. (Claimant) Yes. When I was out to Craig Hospital, I visited with them because I was concerned about some of the problems. They stated and showed me in their handbook that they don't even recommend carpeting anymore at all because -- the doctor said at the time when I asked about it that with the shoulder problems and the elbow problems that are well documented there that I need to get something done about it.[4]

K.S.A. 44-510(a) (Furse 1993) requires an employer to provide an injured worker with medical treatment and such items that are reasonably necessary to cure and relieve the worker from the effects of the injury:

> It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, and apparatus, and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director in the director's discretion so orders, . . . *as may be reasonably necessary to cure and relieve the employee from the effects of the injury.* (Emphasis added.)

Whether or not an item or device cures or relieves an injured worker from the effects of an injury should be determined on a case-by-case basis. And it is a combined question of law and fact.

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[3] P.A.H. Trans. (June 27, 2006) at 7.

[4] P.A.H. Trans. (March 9, 2006) at 32.

The worn carpeting now impedes claimant's movement in his home. Moreover, it comprises a risk to claimant of injuring his shoulders and elbows. Under these particular facts, the Board finds a hard floor is reasonably necessary to relieve claimant from the effects of his work injuries. In addition, it seems incongruous for respondent and its insurance carrier to modify claimant's house to accommodate claimant's wheelchair but now object to providing a hard floor covering, which is needed to allow claimant to move through his house without risking additional injury to his upper extremities.

In short, the Judge's order that respondent and its insurance carrier provide claimant with a hard floor covering should be affirmed.

4. Is claimant entitled to be reimbursed $350 by respondent for the fee of Dr. Dennett?

To support his request for the items involved in this post-award proceeding, claimant presented the deposition testimony of Dr. Dennett. Consequently, the doctor charged claimant $350 for that deposition. In the November 15, 2006, Post Award Medical order the Judge denied claimant's request for reimbursement of that amount. The Board agrees.

The Board has addressed this issue numerous times. The Board continues to believe the plain language of K.S.A. 2006 Supp. 44-510k, which provides that in a proceeding for post-award medical benefits an administrative law judge may award claimant attorney fees and costs, does not contemplate or include the deposition charges of an expert medical witness. In *Krecklow*,[5] the Board held:

> Claimant argues the *[sic]* it was clearly the intent of the legislature to place the entire cost of a post-award request for medical treatment, whether granted or not, upon respondent. Such a view would require the Board to ignore the specific legislative intent *against* shifting all of the expenses associated with the litigation process. For example, K.S.A. 44-510h(b)(2) prohibits a claimant from using the unauthorized medical allowance to obtain a functional impairment rating, K.S.A. 44-555 allows the ALJ to assess reporter fees to any party, and K.A.R. 51-9-6 allows the fees for a neutral physician's report to be assessed to any party. Furthermore, there is no provision for assessing claimant's attorney fees against respondent for pre-award services rendered, even when the only issue is medical treatment and there is no monetary award from which a claimant's attorney can take a fee.
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> If the legislature wanted to ensure the claimant an unfettered and expense-free post award system, then the statute could have indicated as much. As it is,

[5] *Krecklow v. Asbury-Salina Regional Medical Center*, No. 94,353, 2006 WL 3891422 (Kan. WCAB Dec. 14, 2006) (appealed to the Kansas Court of Appeals).

> K.S.A. 44-510k provides that an ALJ "may" award claimant's attorney's fees (regardless of the outcome) and costs. The Board finds that "costs" do not include the claimant's expert witness fees. And absent a statutory mandate, the Board has no inherent power to award costs beyond statutory authorization. [Footnote citing *Grant v. Chappel[l]*, 22 Kan. App. 2d 398, Syl. ¶ 2, 916 P.2d 723[, *rev. denied* 260 Kan. 992] (1996).]

Based upon the above, the Board concludes the Judge appropriately denied claimant's request for reimbursement of the $350 Dr. Dennett charged claimant for testifying in this claim.

5. What, if any, post-award fee is claimant's attorney entitled to receive?

Claimant's attorney submitted an affidavit setting forth the time he allegedly expended in this claim. Respondent and its insurance carrier objected to some of the time that claimant expended on the basis that claimant's staff could have performed the itemized task. They also objected to some of the itemized entries on the basis that those entries could have been further itemized. The Judge approved claimant's request for $4,675 in attorney fees. The Board affirms.

Claimant's attorney's affidavit itemizes the time he spent in this post-award matter. That document establishes that claimant's attorney expended 37.4 hours in this matter, which appears reasonable in light of the many issues involved. Although there may be some validity in respondent and its insurance carrier's criticisms, the Board feels claimant's itemization is reasonable. Claimant's attorney requested a fee of $4,675, which is based upon $125 per hour. There is no evidence that the services claimant's attorney provided were unnecessary or that the amount claimed was unreasonable. The Board affirms the Judge's implicit finding the $4,675 fee is appropriate.

AWARD

WHEREFORE, the Board modifies the November 15, 2006, Post Award Medical order entered by Judge Barnes. The Board reverses the order requiring respondent and its insurance carrier to reimburse claimant $220 for an eye examination. In all other respects, the order is affirmed.

IT IS SO ORDERED.

Dated this ____ day of February, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned Board Member would grant claimant's request to allow him to recover the cost of the expert fees associated with this post-award request. Claimant's counsel makes a compelling argument, in that claimants are continually put to the financial test in establishing their right to benefits, even on a post-award basis. The cost of retaining an expert to establish a claimant's entitlement to further treatment is no less necessary to a post-award request than the medical records are or the presence of one's attorney. Yet, the Board has consistently allowed the recovery of mileage and copy costs, but has refused to allow expert fees. Practically speaking, if the cost of retaining an expert to testify on one's behalf is not considered a recoverable expense, it may deter a claimant from requesting additional medical benefits.

Moreover, K.S.A. 2006 Supp. 44-510k explicitly provides that witness fees may be awarded in these requests for post-award medical benefits. And the legislature did not limit the nature of those witness fees. For these reasons, this Board Member would grant claimant's request for reimbursement of the expenses associated with Dr. Dennett's deposition, in the amount of $350.

BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant
Vincent A. Burnett, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge